carriers in the relevant geographic markets.[136] In both the ***Omaha Forbearance Order*** and the ***Anchorage Forbearance Order,*** the Commission did not consider interconnected VoIP service in its analysis because data was not available that would allow it to refine its wire center analysis, as discussed above.[137] Verizon's Petitions do not try to remedy this shortcoming. The Commission likewise should refuse to consider VoIP competition here.

For all of the foregoing reasons, the Commission should not (and cannot) include the retail market presence of O/VoIP providers in its analysis of whether there is sufficient facilities-based competition to warrant forbearance from section 251(c)(3) unbundling obligations in the mass market or the enterprise market in any wire center in any of the six MSAs that are the subject of Verizon's Petitions.

4. Alternative Transport Facilities

Verizon attempts to justify forbearance in the enterprise market within the six **MSAs** at issue on the purported existence of the "extensive competitive fiber networks" deployed by competitors.[138] Verizon's "proof' consists of figures purporting to represent the number of competitive fiber networks in each MSA. According to the data cited by Verizon, between two and 24 competitors operate fiber networks within the MSAs that are the subject of Verizon's Petitions.[139] Verizon offers maps purporting to show these fiber routes within each

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136 Without knowing the extent to which Verizon's (or other wireline providers') lines are being used to support the O/VoIP providers, it is meaningless for Verizon to cite, in support of its Petitions, analyst reports which discuss the extent to which O/VoIP will displace local telephone access lines. ***See,*** *e.g.,* Verizon Petition - New York, at n.18.

137 ***Omaha Forbearance Order,*** ¶ 72. ***See*** *also* ***Anchorage Forbearance Order,*** ¶ 29

I38 ***See*** Verizon Petition – Boston, at 20; Verizon Petition – New **York,** at 22; Verizon Petition – Philadelphia, at 22; Verizon Petition – Pittsburgh, at 20; Verizon Petition – Providence, at 20; Verizon Petition – Virginia Beach, at 20.

I19 Verizon Petition – Boston, at 20 (12 competitive fiber networks); Verizon Petition – New **York,** at 24 (24 competitive fiber networks); Verizon Petition – Philadelphia, at 24 (12 competitive fiber networks); Verizon Petition – Pittsburgh, at 21 (four competitive fiber

. . .Continued

MSA,[140] and represents that "these fiber routes reach virtually all areas of the . . . MSA where enterprise customers are concentrated."[141]

There are several fundamental problems with Verizon's data. First, the data is not disaggregated enough to permit meaningful analysis. More specifically, Verizon does not present the data on a geographic market (*i.e.,* wire center) specific basis, as required by Commission precedent. For example, it merely claims that "there are one or more known competing fiber providers in at least **[Begin Proprietary] [End Proprietary]** percent of the **[Begin Proprietary] [End Proprietary]** wire centers in the Boston **MSA** that account for 80 percent of Verizon's high-capacity special access revenues."[142] Second, Verizon does not provide adequate detail to evaluate this information. Verizon does not indicate how many competing fiber providers operate in each wire center, it does not provide any substantiation for its claim that these competitive fiber networks "reach virtually all areas in the . . . MSA where

networks); Verizon Petition – Providence, at 21 (three competitive fiber networks); and Verizon Petition – Virginia Beach, at 20 (two competitive fiber networks).

140 *See, e.g., Lew/Verses/Garzillo* **Decl.** – *Boston,* Exhibits 5, **6.**

141 Verizon Petition – Boston, at 21. *See also* Verizon Petition – New York, at 23; Verizon Petition – Philadelphia, at 23; Verizon Petition – Pittsburgh, at 21; Verizon Petition – Providence, at 20; Verizon Petition – Virginia Beach, at 20.

142 Verizon Petition – Boston, at 21. *See also* Verizon Petition – New York, at 22 ("there are at least 24 known competing providers that operate fiber networks within the New York MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles."); Verizon Petition – Philadelphia, at 22 ("there are at least 12 known competing providers that operate fiber networks within the Philadelphia MSA, and those networks span approximately **[Begin Proprietary] [End Proprietary]** route miles."); Verizon Petition – Pittsburgh, at 20 ("there are at least four known competing providers that operate fiber networks within the Pittsburgh MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles."); Verizon Petition – Providence, at 20 ("there are at least three known competing providers that operate fiber networks within the Providence MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles."); and Verizon Petition – Virginia Beach, at 20 ("there are at least two known competing providers that operate fiber networks within the Virginia Beach MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles.").

enterprise customers are concentrated,"[143] nor does it identify the competing fiber providers it claims are operating each route. In the absence of this detail, there is no way to verify Verizon's representations or to substantiate its claims. Importantly, Verizon also fails to provide any information regarding which (if any) of these fiber networks in each wire center reach (and can support the offering of services within a commercially reasonable period of time to) individual customer locations. The extent to which competitive loop facilities have been constructed to individual buildings housing enterprise customers is an essential component to any forbearance analysis. In light of these myriad shortcomings, Verizon's representations regarding competitive fiber deployment should be ignored.[144]

As mentioned above, data regarding the ownership and operation of local transmission capacity along the individual routes and to the individual buildings needed to serve enterprise customers is critical to any analysis of whether section 251(c)(3) loop unbundling remains necessary to protect and promote competition in the enterprise market. Verizon fails to provide any analysis of this important factor. The Commenters, however, have obtained independent data regarding the number of Commercial Buildings[145] served by competitors over their own facilities in the six **MSAs** for which Verizon has requested forbearance. The data identifies all Commercial Buildings in all wire centers within the six MSAs and all buildings

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143 Verizon Petition – Boston, at 21

144 In its comments in response to Verizon's Petitions, the Virginia State Corporation Commission questions the veracity of Verizon's data regarding the existence of competitive fiber networks in Virginia. ***See*** *VCC* ***Comments,*** at 5.

145 For purposes of this analysis, a Commercial Building is defined as any building that has at least one business tenant located at each building.

served by CLECs over their own facilities (also known as "Lit Buildings" since CLECs only deploy fiber)[146] in each wire center within each of the six **MSAs.**

The results are striking and significantly undermine Verizon's claims of competition. The data shows that there is very little competition in any wire center for local loop transmission capabilities. These essential components to the provision of service to enterprise customers are highly concentrated with Verizon. Table I below lists the single wire center with the highest percentage of CLEC Lit Buildings in each of the six **MSAs** at issue. As shown for five of the six MSAs at issue, the highest percentage of CLEC Lit Buildings in any wire center is *less than 1.5%*. In only one MSA, Virginia Beach, does CLEC Lit Building penetration exceed that percentage, and in the Virginia Beach **MSA** the wire center with the highest penetration level is a mere 4.29%.

[146] **A** CLEC Lit Commercial Office Building is defined as any Commercial Building that has fiber-enabled network office equipment that has been placed there by one or more CLEC service providers, which generally indicates that a CLEC has deployed its own fiber or has a long-term lease of dark fiber to that building.

TABLE 1

Wire Center in Each MSA With Highest % of CLEC Lit Buildings	Commerc Building	Commercial CLEC Lit Buildings	% Commercial CLEC Lit Buildings
Boston WLHMMAWE	1,007	15	1.49%
New York NYCMNYBS	4,008	44	1.07%
Philadelphia PHLAPALO	1,676	**32**	*0.68%*
Pittsburgh PITBPADT	1,137	45	1.09%
Providence PRVDRIWA	3,129	79	0.97%
Virginia Beach NRFLVABL	1,654	71	4.29%

Further, as illustrated in Table 2 below, the number of wire centers in each MSA in which there are no CLEC Lit Commercial Buildings is similarly dramatic. It shows **a** significant paucity of facilities-based competition for enterprise customers.

TABLE 2

MSA	Number of Wire Centers	Number of Wire Centers With No CLEC Lit Fiber	% of Wire Centers With No CLEC Lit Fiber
Boston	131	69	53%
New York	115	52	15%
Philadelphia	156	78	50%
Pittsburgh	149	114	77%
Providence	33	11	33%
Virginia Beach	58	16	28%

At least one-third of all wire centers in five of the six MSAs have no CLEC lit fiber and in one **MSA,** Pittsburgh, nearly 80% of all wire centers have no CLEC lit fiber presence in any Commercial Buildings. Clearly, this data compels the Commission to reject Verizon's attempt to rely on alternative fiber networks in support of its request for forbearance.

5. **Competitive Wholesale Service Offerings**

Verizon makes only a cursory attempt to justify its forbearance requests for the mass market and the enterprise market on the basis of wholesale alternatives to the use of Verizon's section 251(c)(3) network elements. [147] Verizon cites the *Omaha Forbearance Order*

[147] *See* Verizon Petition – Boston, at 14-15, 23-24; Verizon Petition – New York, at 14-15, 25-26; Verizon Petition – Philadelphia, at 14-16, 25-26; Verizon Petition – Pittsburgh, at 14-15, 23-24; Verizon Petition – Providence, at 13-14, 22-23; Verizon Petition – Virginia Beach, at 13-15, 23. The Commenters also note that any effort by Verizon to argue that sufficient wholesale alternatives exist rings hollow in light of the fact that Verizon has been expediting the retirement of copper loop plant, which in the hands of competitive providers is used to offer viable alternatives to Verizon's retail services. Numerous competitors, including the Commenters, recently filed petitions for rulemaking with the Commission seeking to ensure that any retirement of copper plant is consistent with the

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as support for its position,[148] hut fails to acknowledge that non-section 251(c)(3) wholesale offerings were irrelevant to the Commission's conclusions in that proceeding. In the *Omaha Forbearance Order,* the Commission firmly grounded its forbearance determinations on the existence of sufficient facilities-based competition by Cox in certain of Qwest's wire centers in the Omaha MSA.[149] Indeed, the Commission expressly concluded that "the record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market."[150] While the Commission found "that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings,[151] this conclusion was not material to its decision to grant forbearance for certain wire centers in the Omaha MSA.[152]

a. Mass Market

Verizon does not present any evidence of alternative sources of wholesale local services being offered by third parties to carriers that utilize Verizon's section 251(c)(3) network elements to serve mass market customers in the six MSAs at issue. Verizon merely represents

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overall public interest. *See Petition of XO Communications, LLC, Covad Conimunicutions Group, lnc., Nu Vox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops*, RM-11358 (filed Jan. 18,2007); *In the Mutter of Policies and Rules Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers,* Petition for Rulemaking and Clarification, RM-11358 (filed Jan. 18, 2007).

148 Verizon Petition – Boston, at 14; Verizon Petition – New York, at 14; Verizon Petition – Philadelphia, at 14; Verizon Petition – Pittsburgh, at 14; Verizon Petition – Providence, at 13; Verizon Petition – Virginia Beach, at 13.

149 *Omaha Forheuranre Order,* ¶ 64.

150 *Id.*, ¶ 67.

151 *Id.*

152 In the more recent *Anchorage Forbearance Order,* the Commission likewise found the absence of "any significant alternative sources of wholesale inputs for carriers in the Anchorage study area," thus concluding that "continued access to [ACS's] loop facilities is important even in wire centers there already is extensive competition." *Anchorage Forbearance Order,* ¶ 30.

that it "has in fact made attractive wholesale offerings available even when it has no obligation to do so."[153] Notably, however, one of the two wholesale services Verizon mentions is its offerings pursuant to the resale provisions of section 251(c)(4) of the Act.[154] Clearly, Verizon is under a statutory obligation to make those offerings available.[155] Verizon's sole evidence regarding the "attractiveness" of these wholesale offerings consists of two figures from December 2005 regarding the number of voice-grade equivalent lines using each product.[156] This data – which is the sum and total of Verizon's proof regarding wholesale competition in the mass market – is out of date. Further, it suffers from the same defect as all of the other data provided by Verizon to support its Petitions, *i.e.*, it is not wire center-specific, and therefore cannot be considered.[157]

Putting aside the issue of lack of proof, Verizon's attempt to ground a section 251(c)(3) forbearance determination for the mass market on the purported existence of "attractive" wholesale alternatives – whether offered by itself or a third party – is impermissible.

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153 Verizon Petition – Boston, at 14; Verizon Petition – New York, at 14, Verizon Petition – Philadelphia, at 14; Verizon Petition – Pittsburgh, at 14; Verizon Petition – Providence, at 14; Verizon Petition – Virginia Beach, at 14.

154 Verizon Petition – Boston, at 14-15; Verizon Petition – New York, at 14-15; Verizon Petition – Philadelphia, at 14-16; Verizon Petition – Pittsburgh, at 14-15; Verizon Petition – Providence, 13-14; Verizon Petition – Virginia Beach, at 13-15.

155 Notwithstanding this statutory obligation, Verizon recently notified its wholesale carrier customers that it proposes to assign their wholesale agreements to FairPoint Communications effective on the closing date of the pending transaction between the two carriers. **A** copy of Verizon's notification letter is attached hereto as Exhibit **3.**

156 Verizon Petition – Boston, at 14-15; Verizon Petition – New **York,** at 14-15; Verizon Petition – Philadelphia, at 14-16; Verizon Petition – Pittsburgh, at 14-15; Verizon Petition – Providence, 13-14; Verizon Petition – Virginia Beach, at 13-15.

157 Even if the lack of granularity were not a bar to consideration of the wholesale service data proffered by Verizon, the Commission should reject it as meaningless. Verizon merely provides the number of voice-grade equivalent residential lines using its Wholesale Advantage service and its section 251(c)(4) resale offerings as of December 2005. Verizon fails to provide any data which shows whether the number of lines utilizing each product is increasing or decreasing. **As** shown below, the level of mass market competition from carriers utilizing Verizon's wholesale facilities and services is steadily decreasing.

In the *Triennial Review Remund Order* the Commission firmly established that the availability of wholesale alternatives should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use the wholesale alternative to enter a market.[158] In the words of the Commission: "It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs."[159]

Even if it were permissible to consider Verizon's Wholesale Advantage service and its section 251(c)(4) resale offerings in determining whether the section 10(a) forbearance standard has been met by Verizon for the mass market, the relief Verizon requests must be denied. Notwithstanding Verizon's blanket statements regarding the appeal of these options as alternatives to the use of Verizon's section 251(c)(3) UNEs to serve mass market customers, the fact is that these wholesale services do not represent economically-viable alternatives for wireline carriers.

With the elimination in the *Triennial Review Remand Order* of their ability to obtain TELRIC-based local switching,"" many competitive carriers were left with few viable alternative means to serve mass market customers. Those few carriers that could economically justify the deployment of a switch to serve mass market customers in particular locations – or to acquire another service provider with an existing switch – began to do so. Carriers without the financial means to self-provide switching, or the customer line density necessary for self-provided switching to be economically viable, stopped actively marketing their services to mass

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158 *Triennial Review Remand Order,* ¶ 48.

159 *Id.*

160 *See Triennial Review Remand Order,* ¶¶ 199-228.

market customers. By June 2006, the most recent date for which the Commission has made data available, ILECs were providing 22% fewer UNE loops with switching (*i.e.*, the type of service arrangement represented by Verizon's Wholesale Advantage product) than six months earlier.[161] Resold lines also are declining.[162] Overall, wireline competitive carriers are exiting the mass market. From June 2005 to June 2006, the number of residential lines served by CLECs declined by approximately 4 million (from 16.33 million to 12.37 million) and from December 2004 to June 2006 the decline was even more precipitous. During that 18-month period, CLEC residential lines dropped 7.4 million (from 19.81 million to 12.37 million).[163]

Verizon, notwithstanding the fact that it carries the burden of proof, has provided no evidence that these nationwide numbers – and the alarming trend they represent – are not applicable to the specific markets for which it is requesting forbearance.[164] If these numbers truly are representative of the state of affairs within the six MSAs at issue here, and we maintain they are, Verizon's request for forbearance on the basis of the wholesale alternatives it has made available to wireline carriers serving the mass market must be denied.

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161 *Locul Telephone Competition: Status as of June 30,2006,* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 4 (Jan. 2007) *("June 2006 Locul Competition Report").*

162 *Id.*

163 *June 2006 Locul Competition Report*, Table 2.

164 The only data relevant to this issue offered by Verizon is the number of voice grade equivalent ("VGE') residential lines, as of December 2005, competitors were serving throughout the **MSA** using Verizon's Wholesale Advantage product and the number of VGE residential lines, as of the same date, competitors were serving throughout the **MSA** using Verizon's section 251(c)(4) resold services. *See, e.g.*, Verizon Petition – Boston, at 14-15. This data, which is over a year old (and is not wire center-specific), does not permit any conclusions regarding trends. Further, importantly, Verizon's data for the Boston **MSA** shows that, as of December 2005, Verizon served nearly 20 times more VGE residential lines than its Wholesale Advantage competitors combined. As of the same date, Verizon served over 370 times more VGE residential lines than its competitors using Verizon's resold services. *Id.*, at n. 23.

Further, the recent experience of McLeodUSA in the Omaha MSA illustrates why the Commission should not take on faith Verizon's representations that its unappealing wholesale alternatives will remain available to wireline competitors.[165] McLeodUSA points out that the Commission in the *Omaha Forbearance Order* "made the predictive judgment that, notwithstanding forbearance from UNE obligations, Qwest would continue to make wholesale offerings of loops and transport [available] to its competitors."[166] McLeodUSA informs the Commission, however, that "Qwest continues to steadfastly refuse to negotiate any commercial or Section 271 pricing for the delisted high capacity UNEs for the affected central offices ("COs")."[167] The Commission should not presume that Verizon would behave any differently.

This is particularly true here, as Verizon does not have the same incentive as Qwest and ACS to make attractive wholesale offerings available to competitors in the absence of a section 251(c)(3) unbundling obligation. In Omaha and Anchorage, Qwest and ACS faced a single competitor with substantial market share and the significant ability to provide retail competition with its own facilities in the near term.[168] An ILEC in those circumstances clearly would prefer to have customers continue to be served in part through its wholesale facilities rather than via the competitor's network exclusively, which would provide the ILEC with no revenue.[169] Here, the circumstances are vastly different and even less favorable to ongoing wholesale competition. There are no competitors in any of the six Verizon MSAs at issue with the competitive leverage enjoyed by Cox in Omaha or GCI in Anchorage. Consequently, in the

165 *See* Letter from Chris MacFarland, Group Vice President, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Dec. 15, 2006).

166 *Id.*, at 1.

167 *Id.*, at 2.

168 *Omaha Forbearance Order*, ¶¶ 59-62; *Anchoruge Forbearance Order*, ¶ 45.

169 *See Anchorage Forbearance Order*, n. 145 (quoting ACS Nov. 30, 2006 Ex Parte Letter).

absence of a section 251(c)(3) unbundling requirement, there would be no corresponding market constraints on Verizon's wholesale pricing behavior.

b. Enterprise Market

Verizon contends that forbearance from section 251(c)(3) unbundling requirements is appropriate in the enterprise market because competitors in the six MSAs at issue are using Verizon's special access services to serve enterprise customers."' Verizon cites the ***Omaha Forbearance Order*** for the proposition that enterprise competition which relies on Verizon's wholesale inputs supports the conclusion that section 251(c)(3) obligations are no longer necessary to ensure that the prices and terms of its offerings are just and reasonable and not unreasonably discriminatory.'" Once again, Verizon misconstrues the ***Omaha Forbearance Order.*** There, the Commission took notice of the fact that "a number of carriers have had success competing for enterprise services using DS 1 and DS3 special access channel terminations obtained from Qwest"[172] and found that special access-based competition "supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary"[173] but, importantly, the Commission did not base its decision to grant Qwest limited forbearance on the existence of special access-based competition.[174]

170 ***See,*** *e.g.,* Verizon Petition – Boston, at 24.

171 *Id.,* at 23 (citing ***Omaha Forbearance Order,*** ¶ ***68).***

172 ***Omaha Forbearance Order,*** ¶ 68.

173 *Id.*

174 Moreover, in the ***Anchorage Forbearance Order,*** GCI's reliance on ACS's wholesale services, including its special access circuits, compelled the Commission to order ACS to continue to provide access to its loop facilities throughout the Anchorage study area, including in wire centers where forbearance from section 251(c)(3) unbundling was granted. ***See Anchorage Forbearance Order,*** ¶ 38 ("we find that a continuing obligation of ACS to provide access to loops and subloops at commercially reasonable rates is necessary to justify the relief we grant ACS today. . .").

There are several important reasons why the Commission should not take into account special access-based competition here. First, the paltry data Verizon offers regarding enterprise competition using special access is not geographic market-specific. Verizon's special access data suffers from the same fatal defect as all of the other data proffered by Verizon, *i.e.,* it is provided on an MSA-wide, not wire center-specific, basis.[175] Second, Verizon has produced no evidence that any carrier relying on its special access service is competing successfully in the local exchange market in any wire center. **As** pointed out by the Commission in the ***Triennial Review Order,*** "a carrier's use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or should continue to do so."[176] Third, there is significant record evidence in the Commission's ***Special Access Reform*** *Proceeding*[177] and elsewhere[178] that Phase I and Phase II incumbent LEC pricing flexibility for special access services has resulted in higher special access prices and that reform of special access pricing rules is in order. Therefore, absent meaningful special access reform, it cannot be concluded that Verizon's pricing behavior would be disciplined if section 251(c)(3) forbearance is granted.

Finally, while it makes no reference in its Petitions to alternative wholesale sources of supply for carriers serving the enterprise market, the Lew/Verses/Garzillo Declaration accompanying five of Verizon's six Petitions mentions "a class of carriers that offer mainly

175 ***See*** Verizon Petition – Boston, at 24; Verizon Petition – New York, at 25; Verizon Petition – Philadelphia, at 25-26; Verizon Petition – Pittsburgh, at 23; Verizon Petition – Providence, at 23; Verizon Petition – Virginia Beach, at 23.

176 ***Triennial Review Order,*** ¶ 64.

177 ***Special Access Rates for Price Cap Local Exchange Carriers,*** Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005) ***("Special Access NPRM").***

178 ***See*** Section VI, *infra.*

wholesale services to other telecommunications carriers."[179] A list of companies, ranging in number from a single entity to four companies, are included for the Boston, New York, Philadelphia, Pittsburgh, and Providence MSAs, but no further detail is provided.[180] These unsupported statements are hardly probative of the nature and extent (if any) of wholesale alternatives to Verizon's special access service for carriers serving the enterprise market in those five MSAs. Consequently, this "evidence" should be ignored by the Commission.

The lack of wholesale alternatives to Verizon's special access services has been acknowledged by the VCC in comments in this docket.[181] The VCC pointed out that its concerns regarding the potential impact on the wholesale special access market as a result of the merger of Verizon and MCI had led it to adopt certain conditions intended to protect competition and the VCC urged the Commission to refrain from granting Verizon any additional relief related to the wholesale special access market "until it is convinced [those] conditions," and the similar conditions adopted by the Commission, "have proved effective."[182] Similarly, the lack of appreciable competition to Verizon in the special access market was acknowledged by the Commission itself in the *Verizon-MCI Merger Order*.[183] There, the Commission found that MCI provided special access service in competition with Verizon's special access services and that the

179 *Lew/Verses/Garzillo* **Decl.** – *Boston,* ¶ 61; *Lew/Verses/Garzillo Decl. – New York,* ¶ 68; *Lew/Verses/Garzillo* **Decl.** - *Philadelphiu,* ¶ 65; *Lew/Verses/Garzillo Decl. - Pittsburgh,* ¶ 54; *Lew/Verses/Garzillo Decl. – Providence,* ¶ *52.* No mention of alternative wholesale suppliers is made in the Verizon Petition for the Virginia Beach **MSA.**

180 *Lew/Verses/Garzillo* **Decl.** – *Boston,* ¶ 61 (listing four carriers); *Lew/Verses/Garzillo Decl. – New York,* ¶ 68 (listing four carriers); *Lew/Verses/Garzillo Decl. - Philadelphia,* ¶ 65 (listing three carriers); *Lew/Verses/Garzillo Decl. - Pittsburgh,* ¶ 54 (listing one carrier); *Lew/Verses/Garzillo Decl. – Providence,* ¶ 52 (listing two carriers).

181 *See VCC Comments,* at 4.

182 *Id.*

183 *Verizon-MCI Merger Order,* ¶ 24. The same conclusion was reached by the NYS Staff in its Verizon-MCl merger proceeding. *See NYS Stuff White Paper,* at 40-46.

merger of those two firms "absent appropriate remedies"[184] was "likely to have an anticompetitive effect on the market for Type I wholesale special access services."[185] The Commission expressly conditioned merger approval on the divestiture of certain facilities and the acceptance of certain voluntary commitments relating to prices for special access services.[186] As suggested by the VCC,[187] the Commission should not award Verizon any additional regulatory relief until the merger conditions have lapsed and it is otherwise clear that Verizon has an ongoing intention to provide attractive wholesale service options.

Indeed, granting Verizon forbearance from the unbundling obligations of section 251(c)(3) would render the Verizon-MCI merger requirement that Verizon not seek any increase in state-approved rates for UNEs in effect as of the approval date of the merger a nullity.[188] Obviously, the prohibition against such rate increases for section 251(c)(3) UNEs would be meaningless if those UNEs no longer existed. The Commission could not have intended for Verizon to be able to completely circumvent this merger condition by obtaining forbearance during the two-year period the condition is in effect. Consequently, any requests by Verizon for forbearance from section 251(c)(3) unbundling obligations should not be entertained until after that merger condition expires.[189]

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184 *Verizon-MCI Merger Order*, ¶ 24.

185 ***Id.***, ¶ 3.

186 *Id.*, ¶ 24.

187 *VCC Comments*, at 4.

188 *See Verizon-MCI Merger Order*, App. *G*, Unbundled Network Elements, ¶ 1

189 The 12-month statutory deadline for action on Verizon's pending forbearance requests will occur well before the two-year federal merger condition prohibiting Verizon from seeking increases in state-approved rates for UNEs will expire.

V. VEKIZON HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

In addition to its request for forbearance from section 251(c)(3) unbundling obligations, Verizon requests relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under section 214 of the Act and Part **63** of the Commission's rules, and the Commission's Computer III rules, including CEI and ONA requirements.[190] Again, Verizon has failed to demonstrate that continued enforcement of these requirements is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement is not necessary for the protection of consumers.

As noted by the Commission in the *Omaha Forbearance Order,* forbearance from dominant carrier regulation is justified only if the state of competition is such that the interests of consumers and competition would be protected in the absence of the regulations at issue.[191] In the Omaha forbearance proceeding, the Commission noted that dominant carrier regulations initially were imposed on ILECs, including Qwest, as a result of a Commission determination that those carriers "have market power in the provision of most services within their service area."[192] Consequently, forbearance from dominant carrier regulation must be preceded by **a** finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it **seeks** forbearance.[193]

190 ***See*** n. ***3***, *infra.*

191 *Omaha Forbearance Order*, ¶ 19.

192 *Id.*, ¶ 11. The Commission defines market power as the "'ability to raise prices by restricting output' or 'to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'" *Id.*, n. 54.

193 *Id.*, ¶ 22.

Market share, supply and demand elasticities, and the firm's cost, structure, size, and resources are all relevant to the Commission's analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power.[194] In granting Qwest forbearance from certain dominant carrier regulations with respect to its mass market exchange access services and its mass market broadband Internet access services in the *Omaha Forbearance Order,* the Commission found that each of these economic factors justified regulatory relief.[195]

Here, Verizon has failed to provide any data to evaluate these factors. Indeed, Verizon fails to address these factors at all in its Petitions. In the absence of any market-specific information that may be used to evaluate Verizon's market share, as well as the other economic factors relevant to an analysis of whether dominant carrier regulation is necessary to protect consumers and competition, the Commission should conclude that Verizon has failed to meet its burden of proof and Verizon's request for forbearance from dominant carrier rules should he denied.

Similarly, Verizon has failed to meet its burden of proof that forbearance from the Computer III requirements is justified. The only mention Verizon makes of Computer III in its Petitions is in the introductory footnote where Verizon identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.[196] Verizon makes absolutely no effort whatsoever to explain how or why forbearance from Computer III requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Verizon's rates, terms and conditions of service are just,

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194 *Id.,* ¶ 31.

195 *Id.,* ¶¶ 39-43.

196 *See, e.g.,* Verizon Petition – Boston, at n. ***3***

reasonable and nondiscriminatory or to protect consumers. Denial of Verizon's request for forbearance from the Commission's Computer III rules therefore must follow.

VI. SECTION 271 IS NOT A SUFFICIENT BACKSTOP TO DEVELOP AND PRESERVE COMPETITION IF FORBEARANCE IS GRANTED

Although the Commission in the *Omaha Forbearance Order* granted Qwest's request for forbearance from the obligations of section 251(c)(3), the Commission did so only while declining to forbear from similar requirements under the competitive checklist contained in section 271(c)(2)(B)(iv) through (vi) of the Act.[197] The Commission reiterated that "checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 . . ."[198] and that "Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory . . ."[199] Indeed, the Commission's willingness to grant Qwest relief from the unbundling obligations of section 251(c)(3) was grounded significantly on the ongoing applicability of section 271's network element requirements.[200]

Similarly, the Commission's decision to grant ACS relief from its section 251(c)(3) unbundling obligations in certain wire centers in Anchorage was conditioned on the continued availability of loop access.[201] Noting that because ACS is not a BOC, and therefore

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197 *Omaha Forbearance Order*, ¶ 100.

198 *Id.*

199 *Id.*

200 *Id.*, ¶ 64 ("We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today."). *See also id.*, ¶ 62.

201 *Anchorage Forbearance Order*, ¶¶ 39-40.

is not subject to the requirements of section 271, the Commission conditioned its grant of forbearance on an obligation that "mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval . . ."[202] Specifically, the Commission compelled ACS to continue to provide legacy loop access at just and reasonable and not unreasonably discriminatory rates upon expiration of the one year transition period adopted by the Commission.[203] The Commission imposed this condition as a "prerequisite to [its] grant of forbearance relief," concluding that "absent this condition . . . [it] would not be able to conclude that the criteria of section 10 are met."[204]

The evidence is quite clear, however, that section 271(c)'s competitive checklist obligations cannot be relied on to discipline Verizon's behavior. As early as the ***Triennial Review*** proceeding, Verizon attempted to convince the Commission that section 271 does not establish a separate BOC access obligation for network elements no longer required to be unbundled under section 251(c)(3) and that "once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied."[205] And Verizon's conduct since the ***Triennial Review Remand Order*** eliminated the section 251(c)(3) requirement that certain network elements be unbundled and made available at TELRIC rates[206] should not be ignored.

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202 *Id.*, ¶ 41.

203 The Commission mandated use of the rates for DSO and DS1 loops currently in effect in Fairbanks, Alaska until such time as alternative rates are agreed to by **ACS** and GCI. ***Id.,*** ¶ 39.

204 ***Id.,*** ¶ 40.

205 ***Triennial Review Order,*** ¶ 652.

206 ***See, e.g., Triennial Review Remand Order,*** ¶ 199.

For example, notwithstanding its commitments to the state commissions in Maine and New Hampshire that it would file and maintain a wholesale tariff covering its competitive checklist obligations under section 271(c)(2)(B) of the Act, Verizon has chosen to file suit against each commission, charging that it should not have to adhere to the tariffing requirement.[207] Verizon's actions in Maine and New Hampshire are consistent with its general position that the commercial negotiation process is the proper vehicle to be employed to arrive at rates and terms for section 271 network elements and that the parties (*i.e.,* Verizon and the competitive carrier customer) should be free to contract without oversight or approval by regulators.[208]

The legal questions surrounding whether state and/or federal regulators have the authority to set rates and terms for section 271 checklist elements, or whether these matters will be left to the private negotiation process, is currently being litigated in multiple jurisdictions[209]

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207 *See New Hampshire Public Utilities Commission v. Verizon New England, Inc.,* Appeal No. 06-2429 (1st Cir.); *Verizon New England Inc. v. Maine Public Utilities Commission,* Appeal No. 06-2151 (1st Cir.).

208 *See, e.g., Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order,* D.T.E. 04-33, Initial Brief of Verizon Massachusetts, Inc. (filed Apr. 5, 2005), at 130. Further, as explained in n. 155, Verizon plans to transfer its negotiated agreements to FairPoint upon completion of the pending transaction between the two parties.

209 *See, e.g., BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action,* WC Docket No. 04-245 (filed Jun. 24, 2004); *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates,* WC Docket No. 06-90 (tiled Apr. 18,2006); *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation,* Docket No. T-01051B-04-0425, Decision No. 68440,2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), appeal pending, *Qwest Corp. v. Ariz. Corp. Comm'n,* No. 2:06-CV-01030-ROS (D. Ariz.) (filed Apr. 13, 2006); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s. Obligations to Provide Unbundled Network Elements, Docket No. 19341-U, Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271,2006* Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and *Order Setting Rates Under Section 271, 2006* Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006),

. . .*Continued*

and the BOCs – including Verizon – are taking advantage of the current unsettled environment by refusing to honor their statutory obligation to make checklist elements available at just and reasonable, and not unreasonably discriminatory, rates and terms. Consequently, until the law becomes settled, the bare existence of an ongoing obligation under section 271 to make loops, transport and switching available cannot be relied upon to police Verizon's behavior and to ensure that competitors are afforded competitively-viable access to the facilities they need to provide service to consumers.

Verizon's position would not be so problematic if the commercial negotiation process could be relied upon to result in rates and terms for section 271(c) checklist items that further Congress' and the Commission's goal "to develop and preserve competitive local markets."[210] But that is not the case. Verizon's response to carriers that must replace Verizon's section 251(c)(3) loop and transport elements in wire centers and on routes that have been de-listed is not to enter into an arms-length, good faith negotiation process. Instead, Verizon merely

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appeal pending, *BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.,* No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n,* No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24,2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006 Ky. PUC LEXIS 680 (Ky. **P.S.C.** Aug. 16, 2006), appeal pending, *BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.,* 3:06-CV-00065-KKC (E.D. Ky.) (tiled Sep. 12, 2006); *Southwestern Bell Telephone **L.P.** d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement,* Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PUC LEXIS 963 (Mo. P.S.C. Jul. 11, 2005), rev'd in part, *Southwestern Bell Tel. L.P. d/b/a SBC Missouri v. Missouri Pub. Serv. Comm'n et al.,* 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. 2006), appeal pending, *Southwestern Bell Tel. d/b/a SBC Missouri v. Big River Tel. Co.*, LLC et al., Nos. 06-3701 and 06-3726 (consolidated) (8th Cir.) (filed Oct. 26, 2006).

210 *Omaha Forbearance Order,* ¶ 64.

provides competitors with a "take-it-or-leave-it" choice among its special access offerings?" Regretfully, Verizon's special access offerings fall far short of the mark.

In mid-2005, in response to the Commission's request for input on potential modifications to its special access regulatory regime,[212] numerous parties urged the Commission to adopt reforms that would more adequately protect the public interest.[213] Those commenters pointed out that the BOCs, including Verizon, retain market power in the provision of special access services and are abusing that market power with unjust and unreasonable rates and terms.[214] Notwithstanding widespread support for special access pricing reform, to date the Commission has not acted in this docket. The recent issuance of a comprehensive report by the U.S. Government Accountability Office ("GAO")[215] has intensified the call for action by the Commission. The GAO Report on special access found extremely low levels of facilities-based competition to customer locations in areas where the Commission has granted special access pricing flexibility, and that prices for special access have risen in areas where Phase II pricing flexibility has been granted.[216] These findings are consistent with Verizon's behavior in the marketplace, as evidenced in part by Verizon's recent introduction of a special access pricing

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211 As predicted by the NYS Staff, Verizon's superior bargaining position and its unwillingness to engage in good faith negotiations with smaller carriers have increased since its merger with MCI. *See NYS Staff White Paper*, at *44*.

212 *See Special Access NPRM*.

213 *See, e.g.*, Comments of XO Communications, Inc., WC Docket No. 05-25 (filed Jun. 13, 2005).

214 *Id.*, at **4**.

215 *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, General Accounting Office, GAO-07-80 (Nov. 2006) (*"GAO Report"*).

216 *GEO Report*, at 9

plan that would raise carrier customers' rates significantly while locking them into a multi-year contractual arrangement.

More specifically, on October 6, 2006, Verizon filed amendments to its Tariff F.C.C. Nos. 1 and 11 to introduce a new Contract Tariff Option ("New Option").[217] The New Option is an offering exclusively for wholesale customers who commit to convert their DS1 and DS3 unbundled network elements to special access services purchased under Tariff F.C.C. Nos. 1 and 11. Customers subscribing to the New Option receive discounted monthly recurring rates on their DS1 and **DS3** special access services. To be eligible to subscribe to the New Option, however, a customer must purchase UNEs in at least three Qualified MSAs[218] and must elect to include 100% of its UNEs in either 100% of its Qualified **MSAs** or 80% of its Qualified MSAs. Customers are not permitted to disconnect, move, or rearrange eligible special access service circuits,[219] and any circuits converted back to UNEs would incur termination penalties.[220] Further, New Option customers are prohibited from subscribing to any additional contract tariff option or specialized service arrangement unless explicitly permitted to do so.[221]

In presentations to its carrier customers, Verizon highlights the elimination of the uncertainty of continuing to operate in the current UNE environment as a particular benefit of the New Option and suggests that carriers should embrace the New Option as "insurance" against the disappearance of UNEs through the regulatory forbearance process. Verizon's "insurance"

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217 Verizon Telephone Companies, Transmittal No. 746 (filed Oct. 6, 2006)

218 **A** Qualified **MSA** is an MSA "where the customer purchases one (1) or more of the Eligible UNEs . . . from the Telephone Company." Tariff F.C.C. No. 1, Section 21.45(B)(2), Verizon Telephone Companies, Transmittal No. 746 (Oct. 6,2006).

219 Grooming for the purpose of changing the amount of applicable channel mileage is permitted. See Tariff F.C.C. No. 1, Section 21.45(F)(4)(c).

220 See Tariff F.C.C. No. 1, Section 21.45(F)(4)(d).

221 ***See*** Tariff F.C.C. No. 1, Section 21.45(H)(1)(a).

comes at a heavy price however. One of the Commenters was provided by Verizon with an analysis of the financial impact of the New Option that showed a cost increase of approximately $250,000 a month, or $3 million annually, as a result of converting its DS 1 and DS3 UNEs to the New Option. The "attractiveness" of such an alternative is highly debatable.

In light of Verizon's marketplace behavior, in order to justify forbearance from section 251(c)(3) unbundling requirements, it is not enough for the Commission to passively note Verizon's ongoing statutory obligations under section 271(c)(2)(B). The Commission must find that Verizon has produced evidence that it is consistently meeting its section 271(c)(2)(B) obligations (and is acting consistently with the requirements of section 10(a)) through the offering of rates and terms for loops and transport that are just and reasonable and not unreasonably discriminatory. Verizon cannot sustain its burden that its treatment of special access meets its obligations under items 4 and 5 of the section 271(c)(2)(B) competitive checklist and would provide a sufficient backstop to protect consumers and competition if section 251(c)(3) unbundling of loops and transport were to he granted by the Commission. Consequently, Verizon's requested section 25 1(c)(3) forbearance relief should be denied.

VII. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST

Beyond Verizon's failure to demonstrate that ongoing section 251(c)(3) unbundling and dominant carrier regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that the Verizon Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Verizon in the six MSAs at issue would run counter to the public interest. And it is not an exaggeration to suggest that granting forbearance would have significant deleterious public interest impacts that would extend far beyond the six MSAs under consideration here.

A. Competition Would Be Diminished If Forbearance Is Granted

In the ***Omaha Forbearance Order,*** the Commission analyzed the third prong of the section 10(a) test (***i.e.***, whether forbearance from the unbundling obligations of section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the wire centers of the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the section 10(a) standard "also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section 10(a)(3)."[222] The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient facilities-based competition in the particular wire centers in which forbearance was granted. Likewise, in the ***Anchorage Forbearance Order,*** the Commission based its grant of forbearance on the fact that "ACS **is** subject to a significant amount of competition in the Anchorage study area."[223]

As discussed above, Verizon has not demonstrated sufficient competition from cable companies, wireless service providers, O/VoIP providers, alternate transport providers, or other sources in any of the subject MSAs on a wire center-specific basis. Accordingly, not only has Verizon failed to meet the first two prongs of the section 10(a) standard, it has failed to satisfy the public interest standard under section 10(a)(3).

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222 ***Omaha Forbearance Order,*** ¶ 75.
223 ***Anchorage Forbearance Order,*** ¶ 49.